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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-129

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NEW YORK CITY REGION OF NEW YORK CONFERENCE OF BRANCHES, ET AL., APPELLANTS

v.

THE STATE OF NEW YORK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

DECISION BELOW

The order of the district court (App. 71a) is not reported.

JURISDICTION

The district court's order denying appellants' motion to intervene and granting summary judgment in favor of the State of New York was entered on April 13, 1972 (App. 71a). The court denied appellants' motion to alter judgment on April 25, 1972 (App. 117a). Appellants filed a notice of appeal on May 11, 1972 (App. 119a) and a Jurisdictional State-

ment on July 21, 1972. The jurisdiction of this Court is invoked under 42 U.S.C. 1973b(a).

QUESTION PRESENTED

Whether the district court erred in denying appellants' motion to intervene in the circumstances of this suit seeking a declaratory judgment under Section 4(a) of the Voting Rights Act of 1965.

STATUTES INVOLVED

Sections 4 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973b and 1973c, are set forth in the Appendix to appellants' brief (S.A.1–S.A.5).

Rule 24 of the Federal Rules of Civil Procedure provides in relevant part:

> (a) *Intervention of right.* Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
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> (b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or

prejudice the adjudication of the rights of the original parties.

STATEMENT

Since we believe the issue here turns on whether the district court properly exercised its discretion in denying appellants' motion to intervene in light of the timing of the motion, the allegations made therein and the other circumstances of this case, we describe the proceedings below in detail.

A. PROCEEDINGS PRIOR TO APPELLANTS' MOTION TO INTERVENE

On December 3, 1971, the State of New York, on behalf of New York, Bronx and Kings Counties, filed suit in the United States District Court for the District of Columbia under Section 4(a) of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973b(a), seeking a declaratory judgment granting an exemption from certain provisions of that Act (App. 1a).[1]

The amended complaint stated that prior to and after 1961 the State had required, pursuant to its constitution, that new voters be able to read and write English, but that the State had complied with Section 4(e) of the Voting Rights Act of 1965, which in part provided that persons who had completed the sixth primary grade in public school in any State, the District of Columbia or Puerto Rico could not be disqualified from voting because of inability to read

[1] On December 16, 1971, New York filed an amended complaint (App. 2a–9a).

or write English, 42 U.S.C. (Supp. IV, 1964 ed.) 1973b(e).[2]

The complaint further stated (App. 5a) that amendments to the Voting Rights Act of 1970 [3] brought these three New York Counties within the coverage of Sections 4(a) and 5 of the Act, as amended, 42 U.S.C. 1973b(a), 1973c.[4] Section 4(a) suspends literacy tests and similar voting qualifications for ten years from "the last occurrence of substantial voting discrimination" in States and political subdivisions within Section 4(b);[5] and Section 5 suspends "all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315–316. The State alleged that in the preceding ten years no test or device had been used in these three Counties with the purpose or effect of

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[2] The amended complaint also stated that the New York City Board of Elections provided new voters with English-Spanish affidavits that could serve as a substitute for a diploma or certificate showing that the prospective voter had the requisite amount of education under the Voting Rights Act of 1965 (App. 3a–4a).

[3] P.L. 91–285, 84 Stat. 315; see 42 U.S.C. 1973b(b).

[4] The Attorney General had determined that New York, Bronx and Kings Counties "maintained on November 1, 1968, any test or device" (see App. 8a) and the Director of the Census had determined "that less than 50 per centum of [the persons of voting age residing therein] voted in the presidential election of November 1968" (see 36 Fed. Reg. 5809 (March 27, 1971)). 42 U.S.C. 1973b(b).

[5] With respect to States and political subdivisions not covered by Section 4(a), Title II of the 1970 amendments also suspended the use of all literacy tests until August 6, 1975, see *Oregon* v. *Mitchell*, 400 U.S. 112, 131 (opinion of Mr. Justice Black). See p. 16, *infra*.

denying the right to vote on account of race or color, and that no court of the United States had, during this period, found that the right to vote had been so abridged in these areas (App. 6a). With respect to the literacy tests administered in 1968, the failure rate was 3.3 percent in New York County, 4.8 percent in Bronx County, and 4.6 percent in Kings County, with the result that 10,147 persons of the 10,574 taking the tests passed (*ibid.*).

On the basis of these claims and the State's further allegations that the three Counties had, since 1964, conducted extensive voter registration drives and encouraged full participation by all their citizens in the affairs of government, the State sought the convening of a three-judge court and a declaratory judgment that these Counties were not subject to Sections 4 and 5 of the Voting Rights Act because, in the preceding ten years, "the voter qualifications prescribed by the State of New York * * * have not been used by the [three Counties] for the purpose or with the effect of denying or abridging the right to vote on account of race or color * * *" (App. 8a–9a).

On March 10, 1972, the United States filed its answer to the complaint, stating that it was "without knowledge or information sufficient to form a belief" about whether the literacy tests conducted in the three Counties had the purpose or effect of denying the right to vote, but that after the 1970 amendments to the Voting Rights Act "the suspension of the literacy requirement was not uniformly implemented" (App. 13a).

On March 17, 1972, the State filed a motion for summary judgment (App. 15a) with accompanying affidavits from the Administrator of the Board of Elections of New York City, which includes New York, Bronx and Kings Counties; the Chief of the State Bureau of Elementary and Secondary Educational Testing; and the Chief Clerks of the New York, Bronx and Brooklyn Borough Offices of the New York City Board of Elections (App. 15a–32a). The affidavits stated that after the amendments to the Voting Rights Act in 1970, which suspended the use of literacy tests in all States throughout the country, see note 5, *supra*, Election Board employees were instructed that proof of literacy was no longer required, that any disregarding of this instruction was unauthorized and involved only isolated instances (App. 17a–18a, 25a–26a, 28a–29a, 31a–32a, 33a),[6] and that a new instruction in this regard would be issued (App. 18a). The affidavits also recited that voter registration drives had been conducted each year since 1964, with the exception of 1967, that "[e]mphasis during the branch registration was given in particular to areas with high density black population," and that "[c]onsiderable money was expended in conduction of these vote registration drives and in encouraging people to register" (App. 18a–19a; see also *id.* at 25a, 28a, 31a).

On April 3, 1972, the United States filed a memorandum consenting to the entry of a declaratory judgment, as required by Section 4(a) of the Voting Rights

[6] See App. 34a–36a, instructing all of the State's Board of Elections that on or after August 7, 1970 "*no proof nor test of literacy shall be required*" (emphasis in original).

Act when the Attorney General has no reason to believe that any test or device had been used during the preceding ten years for the purpose or with the effect of abridging the right to vote on account of race or color (App. 39a). 42 U.S.C. 1973b(a). In an accompanying affidavit, David L. Norman, Assistant Attorney General, Civil Rights Division, stated in part that at his direction Department of Justice attorneys had "conducted an investigation which consisted of examination of registration records in selected precincts in each covered county, interviews of certain election and registration officials and interviews of persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties" (App. 40a). On the basis of the investigation, the Attorney General had determined, under Section 4(a) of the Voting Rights Act, that he had no reason to believe that New York's literacy test had been used with the proscribed purpose or effect (App. 41a). The investigation had disclosed "no allegation by black citizens that the previously enforced literacy test was used to deny or abridge their right to register and vote by reason of race or color" (*ibid.*) and no "individual citizens whose inability to register is attributable to the absence of Spanish language affidavits" (App. 42a). Although the State had not required a literacy test after the 1970 amendments to the Voting Rights Act, there were notations on some registration applications indicating that proof of literacy had been recorded; but the State had later taken reasonable steps to ensure that registration officials were aware of the suspension of literacy tests and the previous notations

on the applications had been made in view of the contingency that the courts might rule in favor of state challenges to the 1970 amendments of the Act (App. 42a).[7]

B. APPELLANTS' MOTION TO INTERVENE

On April 7, 1972, appellants—the National Association for the Advancement of Colored People (NAACP), New York Branch, and five nonwhite, "duly qualified" voters of Kings County—filed a motion seeking leave to intervene as party defendants (App. 44a–47a). It appears that appellants intended to proceed under Rule 24(a), Fed. R. Civ. P. (intervention "as of right") rather than under Rule 24(b) ("permissive" intervention), although the motion makes no reference to Rule 24. Appellants claimed an interest in the subject of the action on the basis that if the court granted New York's motion for summary judgment, thereby exempting the Counties from Sections 4 and 5 of the Voting Rights Act, appellants' suit against the New York City Board of Elections "would necessarily fail" (App. 45a). This suit—*NAACP* v. *New York City Board of Elections* (No. 72 Civ. 1460, S.D.N.Y.)—had also been instituted on April 7, 1972, a few hours before appellants filed their motion to intervene here (App. 92a), and challenged the Assembly, Senatorial and Congressional districts in Kings, Bronx and New York Counties, which had been adjusted by the State on the basis of the 1970

[7] See *Oregon* v. *Mitchell*, 400 U.S. 112.

census.[8] In their suit against the New York City Board of Elections, appellants sought an injunction against implementation of the redistricting of these Counties, which were covered by the Voting Rights Act, contending that the State had violated Section 5 of the Act because the Attorney General of the United States had not yet cleared the new districts (App. 60a). (The issue whether the clearance requirement of Section 5 applies to reapportionment acts of state legislatures is before this Court in *Georgia* v. *United States*, No. 72–75, probable jurisdiction noted, October 16, 1972.)[9]

In their motion to intervene in the instant case appellants further alleged that the United States was not adequately representing their interests because appellants' attorney—Eric Schnapper—had been told by "attorneys in the Department of Justice" during the three weeks preceding April 3, 1972, that "the United States would oppose New York's motion for summary judgment" (App. 46a), and because none of the three Justice Department attorneys appellants' counsel talked with asked him whether he or his clients had any information regarding whether the three Counties should continue to be subject to Sections 4 and 5 of the Voting Rights Act (App. 46a–47a). Appellants'

[8] In their complaint against the New York City Board of Elections, appellants stated that the new Assembly and Senatorial districts had been signed into law on January 14, 1972 (App. 57a [the date is there misprinted as 1971]), and that the new Congresssional districts had been signed into law on March 28, 1972 (App. 58a).

[9] See p. 25, *infra*.

attorney filed an affidavit with the motion to intervene repeating these allegations (App. 48a–51a).

The United States filed no response to appellants' motion to intervene and did not otherwise object to the motion.

On April 12, 1972, the State filed an affidavit from the Assistant State Attorney General opposing appellants' intervention (App. 67a–70a). The affidavit stated that this action had been pending for more than four months, during which Justice Department attorneys had been conducting an investigation and appellants "were *clearly* on notice that this action had been instituted" in view of the widespread publicity it had received (App. 67a–68a [emphasis in original]). Moreover, appellants had had more than four months to present evidence to the Justice Department that the State had used literacy tests to deny the right to vote on account of race, but had not done so (App. 68a), and even appellants' proposed Answer did not allege "any facts of discrimination other than a general allegation of educational inequality" (*ibid.*). The affidavit stated further that appellants' "real purpose is *not* to challenge the application of the literacy test which is central to this action" but rather to attack the State's reapportionment of voting districts in these three Counties (App. 68a–69a). The affidavit alleged that delay in deciding this case would jeopardize the selection of candidates for Congress and state office and the selection of delegates to the Democratic National Convention in view of the coming primary elections scheduled for June 20, 1972, and "would

make it unlikely that a June primary could take place in New York State on District lines based on the 1970 Census figures" (App. 69a–70a).

C. THE DECISION BELOW

On April 13, 1972, the three-judge district court, without opinion, denied appellants' motion to intervene and granted the State's motion for summary judgment (App. 71a–72a).

1. *Subsequent Proceedings.* Thereafter, on April 24, 1972, appellants filed a Motion to Alter Judgment (App. 73a–74a), together with "Points and Authorities" (App. 75a–90a) and another affidavit of appellants' counsel, Eric Schnapper (App. 91a–92a). Apparently believing that the district court had denied leave to intervene because appellants' motion was untimely, appellants' counsel stated in his affidavit that he did not know of this action until March 21, 1972, and had not read about it in the newspapers before that time (App. 91a), but see pp. 34–35, *infra;* appellants' counsel also said that "[t]o the best of my knowledge" the applicants for intervention—the NAACP and five individuals—did not know of this action before March 21, 1972 (*ibid.*), but see pp. 43–44, *infra.* Appellants urged the court to reverse its prior ruling and permit them to intervene (App. 73a). In their "Points and Authorities," appellants argued that "factual questions as to discriminatory effect of the literacy tests are tremendously complex" and set forth a list of matters that should be explored by the court in an evidentiary trial (App. 77a–90a).

One day later, on April 25, 1972, the district court denied, without opinion, appellants' motion to alter the judgment (App. 117a–118a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The declared purpose of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973–1973aa–4, is to enforce the guarantee of the Fifteenth Amendment to the Constitution that the right to vote shall not be denied or abridged on account of race or color.[10] The Act is primarily aimed at literacy tests and "similar tests and devices" used to deny citizens, because of their race or color, the right to vote in federal, state and local elections.[11]

As originally enacted, the Act had three key features: (1) a triggering mechanism that determined the applicability of the Act's substantive provisions; (2) a temporary suspension of "tests or devices"; and (3) a procedure for review of substantive qualifications and practices and procedures relating to voting adopted by States and political subdivisions after November 1, 1964.

Before the 1970 amendments, the substantive provisions of the Act became effective in the first instance only following two factual determinations specified as

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[10] See, *e.g.*, 42 U.S.C. 1973a(a)–(c), 1973b(a) and (e).

[11] Section 4(c), 42 U.S.C. 1973b(c). The phrase "test or device" is defined as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

follows in Section 4(b), 42 U.S.C. (Supp. IV, 1964 ed.) 1973b(b):

> * * * in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

The 1970 amendments to the Act expanded the triggering conditions to include the following two determinations (Section 4(b), as amended, 42 U.S.C. 1973b(b)):

> * * * On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968.

Section 4(b) further provides that these determinations become effective upon publication in the Federal Register and are not reviewable in any court.

Both determinations under the sentence added to Section 4(b) by the 1970 amendments were made with respect to New York, Bronx and Kings Counties in the State of New York (36 Fed. Reg. 5809 (March 27, 1971)).

As an immediate and automatic consequence of these administrative determinations, enforcement of tests or devices is suspended in the affected State or subdivision. While this suspension of tests and devices is in effect, Section 5 precludes the State or subdivision from administering "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on" November 1, 1968,[12] without first obtaining either the acquiescence of the Attorney General or a declaratory judgment from a three-judge district court in the District of Columbia that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c.

The foregoing provisions continue in effect with respect to States and subdivisions brought within coverage by the administrative determinations under Section 4(b), unless, pursuant to Section 4(a), as amended, 42 U.S.C. 1973b(a):

> the United States District Court for the District of Columbia in an action for a declaratory

[12] If the Section 4(b) determinations were made under the first sentence of that Section, the applicable date is November 1, 1964; the date of November 1, 1968, applies to deter-

> judgment brought by such State or subdivision against the United States has determined that no * * * test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color * * *.

Such actions for exemption are to be heard by a three-judge court under 28 U.S.C. 2284, with appeal lying directly to this Court. 42 U.S.C. 1973b(a).

Section 4(a) directs the Attorney General to "consent to the entry of such [declaratory] judgment" if he determines that he has "no reason to believe" [13] that

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minations made, as in this case, under the second sentence of Section 4(b).

[13] The last paragraph of Section 4(b) of the Act provides:

"A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register." We believe that this paragraph does not apply to determinations by the Attorney General under Section 4(a) that he has no reason to believe that literacy tests have been used to deny the right to vote on account of race or color. The nonreviewability clause of the paragraph is tied to the publication requirement and applies only to determinations under Section 4(b) and Section 6, as the court held in *Apache County* v. *United States*, 256 F. Supp. 903, 907 (D.D.C.) (three-judge court) and as this Court appeared to assume in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 317–318, 320–322, 329–333. See also S. Rep. No. 162 (Pt. 3), 89th Cong., 1st Sess. 22 (1965); *Hearings on S. 1564 before the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 67 (1965).

Neither in the present case nor in similar cases has the Attorney General's determination under Section 4(a) been published in the Federal Register.

any such test or device has been so used during the preceding ten years,[14] and Section 4(d) provides that:

> no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

In addition to the changes in the Act mentioned above, the 1970 amendments "prohibited until August 6, 1975, the use of any test or device resembling a literacy test in any national, state, or local election in any area of the United States where such test is not already proscribed by the Voting Rights Act of 1965," *Oregon* v. *Mitchell*, 400 U.S. 112, 131–132 (opinion of Mr. Justice Black). See 42 U.S.C. 1973aa. Thus, even if a State or subdivision is not otherwise covered by the Act, it cannot use a literacy test until 1975. Also, by 1975 States and subdivisions brought within cover-

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[14] A proviso to Section 4(a) prohibits the entry of a declaratory judgment terminating applicability with respect to any plaintiff if a court of the United States has, within the preceding ten years, entered a final judgment determining that the right to vote has been denied on account of race or color by the use of such tests or devices anywhere in the territory of the plaintiff.

No such final judgment has been entered with respect to the State of New York or any of the three Counties involved in this case.

age of the Act in 1965 may be able to avoid the clearance procedures of Section 5 and the Section 4(a) prohibition against using a "test or device" by proving that they have not imposed a test or device in violation of Section 4 for a ten-year period. Cf. *Allen* v. *State Board of Elections*, 393 U.S. 544, 593, n. 12 (Mr. Justice Harlan, concurring in part and dissenting in part). By 1980, States and subdivisions brought within coverage of the Act by the 1970 amendments, such as the New York Counties in this case, will not have imposed a test or device for a ten-year period and may therefore also seek to exempt themselves from the requirements of Sections 4 and 5. Of course, a covered State or subdivision may seek an earlier exemption—as New York did in this case—by bringing an action for a declaratory judgment under Section 4(a) on the basis that the literacy test it had employed in the preceding ten years did not deny the right to vote, rather than on the basis that it had not imposed any test or device at all during that period.

In this case we believe the district court acted within its discretion in denying appellants' motion to intervene. We do not contend that intervention as of right under Rule 24(a), Fed. R. Civ. P., is entirely precluded in Section 4(a) declaratory judgment actions although there is legislative history to support that view. Rather our position is that in light of the timing of appellants' motion to intervene and the nature of the allegations there made, the district court properly refused to allow intervention in the particular circumstances of this case.

Appellants' asserted interest in this case is the same as that represented by the Attorney General: to ensure that the right to vote will not be denied on account of race or color. That appellant filed a Section 5 action against the New York City Board of Elections a few hours before they sought intervention here does not alter the nature of their interest in this case since private Section 5 actions are themselves suits to enforce the public interest brought by "private attorneys general" to supplement the enforcement power of the Attorney General.

While intervention as of right may nevertheless be permitted in this situation, it is necessary under Rule 24(a)(2) for the applicant to show that the Attorney General is not adequately representing the public interest. In their brief in this Court, appellants attempt to make such a showing by setting forth quite serious charges alleging that the Justice Department was intentionally derelict in its investigation with respect to New York's Section 4(a) complaint, and that it capitulated. Yet none of these charges is contained in appellants' motion to intervene or their accompanying papers—all that was before the district court when it denied intervention; they are, therefore, not properly before this Court.

The only supposed defect in the investigation appellants brought to the district court's attention when they sought intervention was the failure of three Justice Department attorneys at any time to ask appellants' counsel whether he had information to

provide. Yet appellants' counsel never offered such information and, as we note below, p. 35, *infra*, it now appears that he was in New Hampshire during the months the government conducted its investigation and did not even begin working for the NAACP Legal Defense and Education Fund, Inc., until March 9, 1972, when he apparently moved to New York City. Moreover, although appellants argue in their brief, on the basis of an affidavit of their counsel, that they were never interviewed during the investigations, appellants now admit that at least two of them were in fact interviewed by government attorneys in the course of the government's investigation, see p. 36, *infra*.

Thus, what appellants' motion to intervene and their claim of inadequate representation come down to is simply this: they do not agree with the Attorney General's conclusion about what the public interest demands in this case. But that does not show inadequate representation by the Attorney General, and the district court properly denied intervention particularly in light of the lateness of appellant's motion to intervene.

Rule 24(a) requires that a motion to intervene be "timely" filed. This action had been pending for more than four months, but it was not until the eve of judgment, after the government had filed its consent, that appellants sought to intervene. Yet on no occasion during the preceding four months did appel-

lants offer any evidence or information to the Attorney General regarding why New York's complaint should be opposed. Appellants' counsel sought to justify their late filing by stating, in an affidavit, that he had no knowledge of this case prior to March 21, 1972. But this is irrelevant in any event, especially since he was in New Hampshire prior to that time and did not begin working in his present employment until March 9, 1972. Appellants' counsel also stated that "to the best of my knowledge" none of the appellants knew of the case, despite the publicity it had received. But this does not say whether counsel even asked the five individual appellants whether they knew about this action, and we are now told that, contrary to representations made below and in this Court, at least two of them were in fact interviewed by government investigators as early as January 1972. As to appellant NAACP, it nowhere appears on what basis appellants' counsel came to his conclusion that this organization was unaware of this case and the district court could properly conclude that the interested members or officers of appellant NAACP should have had knowledge—or, at minimum, were on notice—of New York's Section 4(a) action. The district court acted within its discretion in denying intervention, particularly since allowing intervention at this stage would have disrupted and possibly precluded New York's impending primary elections.

ARGUMENT

THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN DENYING APPELLANTS' MOTION TO INTERVENE

Aside from the jurisdiction question,[15] the only issue in this case is whether the three-judge district court erred in denying appellants' motion to intervene. As noted above, the United States filed no response to appellants' motion (p. 10, *supra*). We believe, however, that in view of the timing of the motion and the claims made by appellants at that stage, the decision whether to allow intervention was a matter within the discretion of the district court and that, in the circumstances of this case, the district court did not abuse its discretion in denying intervention.

We do not argue that intervention as of right under Rule 24(a), Fed. R. Civ. P., is entirely prohibited in declaratory judgment actions under Section 4(a) of the Act, although there is legislative history to support that view. During the 1965 hearings on the Act, Attorney General Katzenbach, when asked whether an individual could intervene and present evidence in a Section 4(a) declaratory judgment action, replied:[16]

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[15] Since we substantially agree with appellants' position, set forth at pp. 13–16 of their brief, that this Court has jurisdiction to review the denial of intervention below and that if it agrees that intervention was properly denied this Court should affirm rather than dismiss for lack of jurisdiction (see our Motion to Affirm in *Symfy Enterprises* v. *United States*, No. 70-329, affirmed, 404 U.S. 802), we have not separately discussed the question of jurisdiction in our brief.

[16] *Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee of the Judiciary*, 89th Cong., 1st Sess., 90–91 (1965) [hereafter *House Hearings*].

Mr. Katzenbach: I would think that there was no right of intervention on the part of an individual, but I suppose individuals could intervene with the consent of the court.

Mr. Copenhaver: And, thereby, declaratory judgment action could possibly be, in contrast to a very short, quick proceeding, a very long proceeding.

Mr. Katzenbach: Yes, I think that is conceivable. I would imagine that if the United States was opposed to the declaratory judgment that was sought, the court would suggest that the people discriminated against make their evidence available to the Department of Justice. I would suppose that if the Department of Justice had no such evidence and was unable to obtain such evidence, then the court might conceivably permit persons to intervene. I would be skeptical that the court in general would allow individual intervention in such a case.

In 1966, the three-judge district court in *Apache County* v. *United States,* 256 F. Supp. 903 (D. D.C.), the first of the six declaratory judgment actions under Section 4(a) since passage of the Act in 1965,[17] came

[17] The cases are: *Apache County* v. *United States*, 256 F. Supp. 903 (D. D.C., 1966); *Alaska* v. *United States* (D. D.C., C.A. No. 101-66, judgment entered August 17, 1966, and C.A. No. 2122-71, judgment entered March 10, 1972); *Elmore County, Idaho* v. *United States* (D. D.C., C.A. No. 320-66), judgment entered September 22, 1966; *Wake County, North Carolina* v. *United States* (D. D.C., C.A. No. 1198-66), judgment entered January 23, 1967; *Gaston County, North Carolina* v. *United States*, 288 F. Supp. 678 (D. D.C., 1968), affirmed, 395 U.S. 285 (1969); *New York* v. *United States* (D. D.C., C.A. No. 2419-71), judgment entered April 13, 1972.

to a conclusion similar to that of Attorney General Katzenbach. Judge Leventhal, speaking for the court, there held that there can be no intervention as of right under Rule 24(a) in these actions since individual applicants cannot show "the equivalent of being legally bound" by the decree in the case;[18] in Section 4(a) cases a declaratory judgment would have no legally binding effect with respect to an individual's private interest since he would still be able to prosecute a private action to protect his right to vote. (256 F. Supp. at 907). The court indicated, however, that there may be appropriate situations in which permissive intervention under Rule 24(b) should be allowed (*id.* at 908).

The testimony of Attorney General Katzenbach in 1965 and the decision in *Apache County* in 1966, however, must be considered in light of the fact that Rule 24(a) has subsequently been revised. Prior to July 1, 1966, when the amendments to the Rule became effective, an applicant for intervention as of right under Rule 24(a)(2) had to show not only that the representation of his interest in the action is or may be inadequate, but also that he "is or may be bound by a judgment in the action." See 3B *Moore's Federal Practice* ¶ 24.08 (2d ed. 1969). In contrast, the amended version of Rule 24(a)(2) [19] now provides

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[18] The court quoted *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 694.

[19] Appellants have not claimed that the Voting Rights Act confers upon them "an unconditional right to intervene," as is required by Rule 24(a)(1).

that upon timely application a person has a right to intervene when he claims an interest relating to the subject matter of the dispute such that disposition of the action "may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Although the revisions to Rule 24(a) thus relax the requirement that the applicant be bound under the doctrine of res judicata, the nature of the applicant's interest required for intervention as of right remains unchanged by the amendments,[20] and, in that respect, both *Apache County* and Attorney General Katzenbach's testimony are still significant.

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[20] See 3B *Moore's Federal Practice*, *supra*, at ¶ 24.09-1[2]; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (*I*), 81 Harv. L. Rev. 356, 405 (1967) (the author served as reporter to the Advisory Committee on Civil Rules from 1960 to July 1, 1966, *id.* at 356, n. *); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 380 U.S. 129, 153–154 (Mr. Justice Stewart, joined by Mr. Justice Harlan, dissenting). See also *Hobson* v. *Hansen*, 44 F.R.D. 18, 24 (D. D.C.):

"[W]hile one's interests need no longer be decisively affected before intervention will be allowed, there is nothing in the new rule or in its attendant commentary to indicate that it effected a change in the kind of interest required. Thus the thrust of the revision seems clearly to be concerned with [the] adequacy of representation and not with any notion of expanding the *types* of interests that will satisfy the rule. Still required for intervention is a direct, substantial, legally protectable interest in the proceedings."

A. APPELLANTS' INTEREST IN THIS CASE IS NOT DIFFERENT FROM THE PUBLIC INTEREST IN PREVENTING THE DENIAL OF THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR, WHICH IS THE INTEREST REPRESENTED BY THE ATTORNEY GENERAL UNDER THE ACT

In their Motion to Intervene in this case, appellants claimed an interest in this action on the basis that a few hours earlier they had brought suit against the New York City Board of Elections seeking to enjoin implementation of the State's reapportionment Acts because this legislation had not yet been submitted to the Attorney General for clearance under Section 5 of the Voting Rights Act (App. 45a–46a; see Appellants' Brief, at 22–26). As we noted above, p. 9, *supra*, the question whether Section 5 applies to State reapportionment legislation is now before this Court in *Georgia* v. *United States*, No. 72–75, probable jurisdiction noted, October 16, 1972, where the United States has argued that the Section 5 clearance procedures do apply to such legislation.[21]

Assuming *arguendo* that this Court will agree with us in the *Georgia* case, we submit that appellants' Section 5 action nevertheless does not confer upon them any special interest in this case distinct from the public interest represented by the Attorney General.[22] Their Section 5 action is merely derivative; it

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[21] We have supplied counsel for appellants and counsel for the State of New York with copies of our brief in the *Georgia* case.

[22] Of course, if this Court rules in the *Georgia* case that reapportionment legislation is not covered by Section 5 then appellants' Section 5 action would not even be in vindication of the public's interest of ensuring compliance with the Act.

may be maintained only so long as the three Counties involved in this case properly remain subject to Section 4 of the Act since Section 5 applies only to States and subdivisions covered by Section 4. See pp. 12 to 14, *supra*. Indeed, in a Section 5 suit brought by individual citizens, such as that instituted by appellants here, individuals act on behalf of the public interest as private attorneys general. This was the basis for the holding in *Allen* v. *State Board of Elections*, 393 U.S. 544, 554–557, that despite the Act's failure to provide a private right of action, private citizens could sue—as appellants have done—to require new enactments to be submitted for clearance under Section 5; in light of the Attorney General's limited resources, such private actions provide a necessary supplement to governmental enforcement of Section 5.

Therefore, appellants' nearly simultaneous filing of the Section 5 action did not transform the nature of their interest in this case into anything distinguishable from the general public interest embodied in the Act and represented by the Attorney General on behalf of the United States in ensuring that members of minority groups will not be denied the right to vote on account of race or color. Indeed, appellants virtually concede as much in their brief, at p. 48, where they argue that "private parties may step forward and seek to indicate their own and the public interest when dissatisfied with the government's handling of a case in which they have a substantial interest."

Likewise, appellants' assertion of a "more general interest in retaining the safeguards of sections 4 and 5"[23] does not differentiate their interest from that represented by the Attorney General, particularly since it does not appear that any of the individual appellants have ever been denied the right to vote in New York, by literacy tests or otherwise, on account of race or color.[24] As Judge Leventhal stated for the court in *Apache County v. United States, supra,* 256 F. Supp. at 906:

> But the right enforced by * * * [the remedies in the Voting Rights Act] is a public right, appertaining not to individual citizens, but to the United States itself—called upon by Congress, in implementing the Fifteenth Amendment, to vindicate the right of all citizens of the United States collectively to be free from discrimination in any part of the United States on account of race or color. This public right and remedy are supplementary to but analytically distinct from the individual rights of those discriminated against by or in the areas involved.

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[23] Appellants' Brief, at 23. In their Motion to Intervene (App. 44a-46a), appellants relied mainly on their Section 5 action against the New York City Board of Elections and did not articulate any other interest in this case aside from the quite apparent observation that if New York prevailed in its declaratory judgment suit for an exemption, the protections of the Act would no longer apply.

[24] The individual appellants describe themselves as "duly qualified" voters in Kings County, New York (App. 44a), and three of the five (Wright, Stewart and Fortune) are members of the state legislature (*ibid.*).

B. APPELLANTS' ALLEGATIONS IN THEIR MOTION TO INTERVENE FALL SHORT OF INDICATING THAT THE ATTORNEY GENERAL WAS NOT ADEQUATELY REPRESENTING THE PUBLIC INTEREST, WHICH APPELLANTS MUST SHOW IN ORDER TO INTERVENE UNDER RULE 24(a)(2)

Although appellants' interest in this case is thus in substance similar to that of the public at large, which the Attorney General represents, *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, if not limited to antitrust cases or cases involving alleged non-compliance with a prior judicial decree, may indicate that there nevertheless can be intervention as of right under Rule 24(a)(2) when the government's representation of the public interest has been inadequate. In *Cascade*, this Court upheld the right of others to intervene in a government civil antitrust suit after a negotiated settlement had been presented to the district court for approval as a final decree. This Court apparently believed that the government had not adequately represented the public interest because the proposed decree differed significantly from this Court's mandate ordering divestiture, which had been issued at an earlier stage of the proceedings (*United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 662). See 386 U.S. at 131, 136–143; *id.* at 154–159 (Mr. Justice Stewart, joined by Mr. Justice Harlan, dissenting).[23]

[23] See *The Supreme Court, 1966 Term*, 81 Harv. L. Rev. 69, 221–223 (1967); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 741–743 (1968); cf. Kaplan, *supra*, note 20, 81 Harv. L. Rev. at 406.

However, as the court held in *Apache County, supra,* 256 F. Supp. at 908, with respect to actions for declaratory judgments under Section 4(a) of the Voting Rights Act,

> Congress assigned to the Attorney General the primary role in vindicating the public interest under the Act. We should be reluctant indeed to permit intervention in a section 4(a) action in the absence of a plausible claim that the Attorney General is not adequately performing his statutory function, and that intervention is needed to enable the court properly to perform its declaratory function or in some other way to protect the public interest.

This, we believe, correctly indicates that in Section 4(a) actions the mere claim that the Attorney General has not sufficiently represented the public interest does not entitle the applicant to intervention as of right, nor does the mere assertion of a different theory of the public interest. See Attorney General Katzenbach's testimony, quoted at p. 22, *supra.*

Trbovich v. *United Mine Workers,* 404 U.S. 528, on which appellants rely,[28] is not to the contrary. This Court there stated that an applicant for intervention as of right under Rule 24(a) is required to show only that the representation of his interest "may be" inadequate and that the applicant's burden in this respect should be treated as "minimal." 404 U.S. at 538, n. 10. However, the applicant for intervention in *Trbovich* asserted a personal interest in the action, which could have been at odds with the public interest

[28] Appellants' Brief, at 26.

represented by the government; the Court held that even though the government is adequately representing the public interest, intervention under Rule 24(a) is proper when the applicant has a "valid complaint" about the government's representation of his private interest.[27]

In contrast to *Trbovich,* the appellants here have claimed no special interest of their own that is distinct from the general public interest expressed by the Voting Rights Act in preventing racial discrimination in voting qualifications. And in order to permit intervention as of right in these circumstances a court would have to reach the "somber conclusion"[28]—unnecessary to reach in the *Trbovich* situation—that the Attorney General had not adequately represented the public interest. This is a conclusion that should not be lightly made.

1. THE TIMING OF APPELLANTS' MOTION TO INTERVENE WAS RELEVANT IN ASSESSING THE ADEQUACY OF APPELLANTS' ALLEGATIONS REGARDING THE ATTORNEY GENERAL'S REPRESENTATION OF THE PUBLIC INTEREST.

Rule 24(a) provides for "Intervention of Right" only "Upon timely application * * *." Therefore, in assessing an applicant's claim of inadequate representation of the public interest in Section 4(a) cases, the trial court must take into account not only the

[27] 404 U.S. at 539 ("Even if the Secretary [of Labor] is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of 'his lawyer'.").

[28] Kaplan, *supra*, note 20, 81 Harv. L. Rev. at 406.

nature of the allegations made in the motion to intervene but also the timing of that motion. If the motion is not filed until the end of the litigation, the applicant should be required to make a more substantial showing of inadequacy because, at that stage, allowing intervention is much more likely to disrupt the plaintiff-State's election processes.

To this extent, the requirement in Rule 24(a) that the motion for intervention be "timely" converges with the requirement that the applicant show inadequate representation of the public interest. Where, as here (see pp. 41–47, *infra*), the motion to intervene presents a serious question of timeliness, the matter thus becomes one that must be substantially entrusted to the trial court's discretion, even though Rule 24(a) speaks in terms of a "right" to intervene. Indeed, one commentator has concluded that whenever a motion for intervention as of right is based on the inadequacy of the government's representation, there should be [29]

> express recognition of the discretionary nature of the judgment, of the interrelationship of the many factors involved [in determining whether to allow intervention as of right], and of the difficulty of focusing in advance on any one or two controlling considerations. Recognition that

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[29] Shapiro, note 20, *supra*, 81 Harv. L. Rev. at 759; see also *id.* at 746.

Professor Shapiro notes, however, two situations in which the trial court should have no discretion to refuse intervention: (1) where the applicant would qualify for joinder under Rule 19(a)(2)(i); and (2) where the applicant seeks to intervene in a class action and he is a member of the class and the representation of his interest is not adequate. *Id.* at 758–759. Neither of these situations is present here.

> *the matter is one of discretion* of course, should not and need not mean an abdication of the reviewing function. But it does suggest that there will be many instances in which a decision either way will be acceptable—instances in which *the appellate court should not substitute its judgment for that of the trial court.* [Emphasis added.]

We believe that in this case the district court properly exercised its discretion in denying appellants' motion to intervene in light of the timing of the motion and appellants' allegations therein.

2. APPELLANTS' MOTION TO INTERVENE DID NOT PRESENT THE DISTRICT COURT WITH ANY BASIS FOR CONCLUDING THAT THE ATTORNEY GENERAL HAD NOT ADEQUATELY REPRESENTED THE PUBLIC INTEREST.

A considerable portion of appellants' brief in this Court is devoted to an attempt to show that the Attorney General did not adequately represent the public interest in ensuring that persons are not denied the right to vote on account of race or color (Appellants' Brief, at 26–36). Whether intended merely as hyperbole or not, appellants have advanced a number of quite serious accusations. They charge that the investigation of New York's complaint by attorneys in the Civil Rights Division of the Justice Department was "well calculated to reveal nothing" of significance (*id.* at 29); that the "results of this investigation were predictably barren" (*ibid.*); that the govern-

ment attorneys' alleged failure to investigate significant discrimination is "inexplicable and unjustifiable" (*ibid.*); that "investigations and theories" were "deliberately not pursued" (*ibid.*); that the government's position below was a "capitulation" (*id.* at 27); that this was an "abortive investigation" (*id.* at 21); and that the Attorney General did not even ask the district court to retain jurisdiction over the case for the next five years although such a "precautionary measure is mandatory under section 4" (*id.* at 27).[20]

If this Court is to determine whether the district court erred in refusing intervention in light of the foregoing accusations, as appellants obviously contemplate, then the court's denial of intervention should be affirmed. For not a single one of these charges was before the district court when it denied appellants' motion to intervene (see App. 44a–51a)—a point nowhere mentioned in appellants' brief in this Court.[21]

The only alleged "defect" in the government's investigation that appellants alluded to in their Motion

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[20] Such a request is obviously unnecessary since Section 4(a) directs that "[t]he court *shall* retain jurisdiction * * * for five years after judgment" (emphasis added); this is mandatory and there is no requirement that the Attorney General request the court to retain jurisdiction.

[21] In their Motion to Alter Judgment filed after the district court had denied intervention and entered a declaratory judgment for New York, appellants said only that the United States should have "undertake[n] a more thorough investigation" (App. 74a) apparently with respect to educational inequality (see App. 89a–90a ["Points and Authorities"]). The court denied this motion one day later, on April 25, 1972, before New York or the United States had an opportunity to respond.

to Intervene[32] was that at no time did any of the three Justice Department attorneys whom appellants' counsel had telephoned on March 23, 29, and April 3, 1972,[33] "inquire of counsel for petitioners whether he or any of the petitioners had information or evidence which would" show that New York was not entitled to a declaratory judgment under Section 4(a) (App. 46a).[34] Of course, this does not say whether other government attorneys made such inquiries or whether appellants' counsel even had any information to provide; and it implicitly admits that appellants' attorney never offered these government attorneys any information about New York's use of literacy tests.

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[32] Their Motion to Intervene (App. 44a–47a), accompanied by an affidavit from their attorney (App. 48a–51a), also discusses their action against the New York City Board of Elections (see pp. 25–26, *supra*), which had been brought a few hours earlier (App. 92a), and alleges that government attorneys misled appellants' counsel into believing that the Attorney General would not consent to New York's motion for summary judgment—a contention we discuss *infra*, at pp. 46–47.

[33] See p. 9, *supra*.

[34] Appellants' counsel, Eric Schnapper, stated in his affidavit, filed with the Motion to Intervene, that (App. 51a): "At no time did any of these three attorneys inquire whether I or petitioners had any evidence as to whether New York or officials in Kings, Bronx or New York counties had ever used a test or device, as defined in 42 U.S.C. § 1973b, with the purpose or the effect of denying or abridging the right to vote on account of race or color."

More important, there would have been no reason for the government, during the course of its investigation from December 1971 to March 1972, to make any such inquiries of appellants' counsel, Eric Schnapper. In an affidavit filed after the court had denied intervention, Mr. Schnapper stated that "[t]hroughout the months of December, 1971 and January and February, 1972, I was in the state of New Hampshire" (App. 91a).

In any event, Mr. Schnapper has now informed us that he did not begin his employment as an attorney with the NAACP Legal Defense and Education Fund, Inc., until March 9, 1972,[25] apparently after he moved from New Hampshire and three months after New York filed this action. It is therefore still more apparent why Mr. Schnapper was never "interviewed or even informed by the Justice Department that any investigation was underway" (Appellants' Brief, at 28–29).

As to the individual appellants, their Motion to Intervene nowhere alleges that *they* had not been asked to provide information, but states only that three government attorneys had not requested their

[25] Mr. Schnapper has agreed that we should disclose this fact to the Court.

counsel to supply information from them. (Again, there is no indication that the individual appellants in fact had relevant information to provide or that they ever offered this to the government.) While this is of dubious significance to the adequacy of the government's representation since any failure to interview these particular appellants or their counsel scarcely indicates that the government's investigation had not been faithfully and diligently pursued, it is in any event now apparent that appellants' allegations that they were never interviewed about this case (Brief, at 28-29; App. 51a, 91a [affidavit of Eric Schnapper]) are not accurate. Their attorney, Mr. Schnapper, has agreed to the following statement: Appellants' counsel recently discovered that Justice Department attorneys in fact met with appellants Stewart and Fortune in January 1972 during the course of their investigation; although the Justice Department attorneys recall informing Stewart and Fortune that this case was pending, neither Stewart nor Fortune can remember being so informed.

All that remains in regard to the Motion to Intervene is appellants' assertion that the United States is not adequately representing their interests because, if New York's motion for a declaratory judg

ment were granted, appellants' Section 5 complaint against the New York City Board of Elections, filed earlier the same day, would fail (App. 46a–47a). But this in no way indicates that the Attorney General's representation in the instant case was, or even might have been, inadequate. As we previously discussed, pp. 25 to 27, *supra*, Section 5 requires States and subdivisions covered by Section 4 to submit new legislation affecting voting qualifications to the Attorney General for clearance. A private action under Section 5, such as appellants', supplements the enforcement power of the Attorney General, as this Court held in *Allen* v. *State Board of Elections, supra*, 393 U.S. at 556–557. But the circumstance that it is instituted by private parties rather than the Attorney General does not alter the fact that the interest at stake is that of protecting minority groups from racial discrimination in voting qualifications—the public interest that the Act itself directs the Attorney General to represent. See *Apache County* v. *United States, supra*, 256 F. Supp. at 908, quoted on p. 27, *supra*.

That appellants disagree with the Attorney General's decision to consent to New York's motion for

a declaratory judgment does not show that the Attorney General failed to represent the public interest adequately. Appellants' argument to the contrary, based on their Section 5 suit, is merely a bootstrap contention. The situation here is the same as if private individuals sued in the morning to enforce, on behalf of the public interest, a preliminary decree in a government suit and then claimed in the afternoon that they are entitled to intervene in the main action because the government had earlier consented to the entry of a judgment that would end their derivative suit.

Thus, we submit that appellants did not present the district court with any substantial basis for concluding that they should be allowed to intervene as of right on the ground that the Attorney General had not adequately represented the public interest. And as we argue below this deficiency in appellants' motion together with the lateness of its filing show that the district court properly exercised its discretion in denying intervention.

3. THE ATTORNEY GENERAL PROPERLY PERFORMED HIS DUTY UNDER THE ACT BY FILING A CONSENT TO THE DECLARATORY JUDGMENT AND AN ACCOMPANYING AFFIDAVIT.

Before discussing the timeliness point, however, we are constrained to respond to appellants' suggestions—in their brief in this Court [36] but not in their Motion to Intervene or accompanying papers in the district

[36] See, *e.g.*, Appellants' Brief, at 27, 42–43.

court [37]—of impropriety in the manner in which the Attorney General consented to the judgment below by filing a memorandum and an affidavit stating in part that, on the basis of an investigation, there was no reason to believe that the Counties had imposed literacy tests in the last ten years with the purpose or effect of denying the right to vote on account of race or color.[38]

The Act itself requires that if the Attorney General determines that he has no such reason to believe "he shall consent to the entry of [a declaratory] judgment" under Section 4(a), 42 U.S.C. 1973b(a). See pp. 15–16, *supra*. And the procedure followed by the Attorney General here is precisely what was contemplated, as the following testimony by Attorney General Katzenbach during the 1965 Senate and House hearings clearly indicates:

> *Attorney General Katzenbach:* Senator, I think this law, like any other law, takes in the normal practices that go on in court.
>
> *Senator Ervin:* Oh, no, it reverses them. That is one of my objections to it. It turns them around. It requires the State or political subdivision to establish its innocence, complete innocence.
>
> *Attorney General Katzenbach:* Senator, if you were, as you were, a distinguished judge and a petitioner came in for a declaratory judgment and the petitioner came in simply with a [sic] affidavit of the Governor of the State, and said he knew of no instance of discrimination by any

[37] App. 44a–47a, 48–51a, 63a–66a.
[38] App. 39a–43a.

State official under color of law that had the effect of denying or abridging the right to vote within his State for a 10-year period, and the Government of the United States, as the defendant in this, came in and offered no evidence whatsoever that there ever had been—I just put that case to you—they came in and did it. Would you not give them a declaratory judgment? I would.

* * * * *

Attorney General Katzenbach: They have to allege it. That is all they have to do. Then the court, on the basis of whatever evidence it has, makes the determination. There is no evidence to the contrary. I do not see how they could fail to make the determination that would be required.

In fact, it seems to me that just on those pleadings, there could be a summary judgment without actually putting in any evidence, any witnesses, or anything more.

Senator Ervin: Well, why—

Attorney General Katzenbach: You can ask for a summary judgment on the pleading. They allege no discrimination, the United States has no evidence of discrimination—boom, summary judgment for the State or for the county.[39]

* * * * *

Mr. Cramer: Isn't it an almost impossible burden to show 10 years of nondiscrimination?

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[39] *Hearings on S. 1564 before the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 49–51 (1965).

Mr. Katzenbach: I don't think it is an impossible burden for a State that has not discriminated. Where people have not been discriminated against, I think it would be pretty simple. Actually, all you have to do is come into court and say that you have not discriminated and then if the Department of Justice does not have evidence that you have, that is probably the end of the matter. I would think that you could shift the burden of going forward with the evidence by a simple affidavit from the appropriate officials that there had been no discrimination.

The Department of Justice would have to put on whatever evidence it had of discrimination and that evidence would have to be rebutted if that were possible by the State involved. It does not seem to me very complicated.[40]

C. APPELLANTS' MOTION TO INTERVENE WAS NOT TIMELY FILED AS RULE 24 REQUIRES AND APPELLANTS HAVE OFFERED NO VAILD JUSTIFICATION FOR THEIR FAILURE TO ACT EARLIER BY SUPPLYING THE GOVERNMENT WITH INFORMATION ABOUT DISCRIMINATION IN VOTING IN THE THREE COUNTIES

One prerequisite to intervention as of right under Rule 24(a)(2) is that the application to intervene be "timely." We believe that in this case the district court acted well within its discretion in denying appellants' motion to intervene in light of the lateness of its filing and the insufficiency of the allegations contained therein.

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[40] *House Hearings* 92–93.

New York commenced this action on December 3, 1971, yet appellants did not seek intervention until April 7, 1972, after the United States had consented to the entry of a declaratory judgment, which the court entered on April 13, 1972 (App. 1a, 39a, 44a–47a, 71a–72a). In opposition to appellants' motion to intervene, counsel for the State of New York filed an affidavit on April 12, 1972, pointing out that this action had been pending for more than four months, that appellants were clearly on notice of the action in view of the newspaper publicity it had received, and that appellants at no time during this period had presented, or offered to present, any evidence—if they had any—regarding whether and how the three Counties had used literacy tests to deny the right to vote on account of race or color (App. 67a–68a).

After the court denied intervention, appellants' counsel, Eric Schnapper, apparently believing that the court had based its decision on the timeliness issue, filed an affidavit stating that prior to March 21, 1972, he had no knowledge of this action and that "[t]o the best of my knowledge neither my co-counsel nor any of the applicants for intervention knew of the commencement, pendency or existence of this action prior to March 21, 1972" (App. 91a). Relying on this affidavit, appellants argue in their brief in this Court, at p. 40,[41] that it would not have been reasonable to require them to seek intervention earlier since they had not known of this case. We deal first with this contention and then discuss appellants' further

[41] See also p. 40, n. 56.

attempts to justify their late filing, including the claim that Mr. Schnapper had been misled by Justice Department attorneys (Appellants' Brief, at 37–38).

To begin, it is difficult to understand the relevance of Mr. Schnapper's lack of knowledge of the pendency of this action: he is merely acting as counsel for the individual appellants and appellant NAACP, and the significant question would appear to be whether these appellants—not Mr. Schnapper—had or should have had such knowledge. In any event, as we noted above, p. 35, *supra*, Mr. Schnapper did not begin working for the NAACP Legal Defense and Education Fund, Inc., which represents the NAACP in legal matters, until March 9, 1972, and before that time was living in New Hampshire (App. 91a). That Mr. Schnapper did not become aware of this suit until March 21, 1972, is therefore no justification for the timing of appellants' motion to intervene.

As to the individual appellants, Mr. Schnapper says only that to the "best of my knowledge" they were not aware of the case before March (App. 91a). But it does not appear whether Mr. Schnapper ever asked his clients about this or whether they read the newspaper articles about the case. And it now appears that at least two of the individual appellants in fact were interviewed in January 1972 by government attorneys investigating New York's complaint, see pp. 36–37, *supra*.[42]

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[42] Compare App. 51a; Appellants' Brief, at 28–29.

Moreover, with respect to appellant NAACP, New York Branch, it nowhere appears how appellants' counsel came to his implied conclusion that this organization was unaware of the pendency of this case.[43] In light of the New York Times article referred to in the affidavit of New York's attorney in opposition to intervention (App. 67a), we submit that the district court could properly conclude that, at a minimum, the NAACP was on notice of New York's Section 4(a) complaint.

While appellants argue that they sought to intervene at the first possible moment, they did not assert that either during or after the investigation they had offered evidence to the government about discrimination in voting by the use of literacy tests in these three Counties.[44] In light of this and the nature of the excuses offered by appellants for the timing of their motion, the last of which we discuss below, *infra*, p. 45, together with their failure to allege any substantial basis to support the conclusion that the Attorney General had given inadequate representation, we believe the district court

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[43] For example Mr. Schnapper's affidavit does not say whether he polled the individual members or officers of the NAACP Branch or otherwise inquired of them about their knowledge of this action.

[44] See Attorney General Katzenbach's testimony in *House Hearings* 91:

"*Mr. Copenhaver:* May I say if the party is unable to intervene by court permission, he would come to the Attorney General and the Attorney General could present that [the person's evidence of discrimination] before the court?

Mr. Katzenbach: Yes."

acted within its discretion in denying intervention, particularly since allowing intervention at that stage would have disrupted and possibly precluded the selection of candidates for Congress and state office and the selection of delegates to the Democratic National Convention in view of the coming primary elections in New York scheduled for June 20, 1972, as the State of New York pointed out below (App. 69a–70a) and argues in its brief in this Court, at pp. 10–12.[45]

Finally, the only other excuse offered by appellants for seeking intervention at the eleventh hour is, as they assert in their brief in this Court, at p. 37, that "on March 23, 29 and April 3, [1972,] three different Justice Department attorneys assured counsel for the NAACP [Eric Schnapper] that the United States would oppose New York's motion for summary judgment." (See App. 46a–47a [Motion to Intervene]; App. 48a–51a [Affidavit of Eric Schnapper].) From this appellants argue that their motion to intervene should not be considered untimely because that would

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[45] For these reasons the court also acted within its discretion in denying appellants' Motion to Alter Judgment filed on April 24, 1972, after the court had denied intervention on April 13, 1972 (App. 73a–74a, 117a–118a).

Moreover, appellants would not have been automatically entitled to permissive intervention under Rule 24(b), as they now suggest in this Court (Brief at p. 26, n. 39) since—in the language of Rule 24(b)—intervention at that stage would have "unduly delay[ed] or prejudice[d] the adjudication of the rights of the original parties" in light of New York's scheduled primary elections.

require the filing of precautionary motions to intervene before the applicant for intervention knew the United States would not give adequate representation to the public interest (Appellants' Brief, at 40–41). Appellants further contend that even if they had sought intervention earlier the court could not have decided whether to grant their motion at that time (*id.* at 41).

In our view, however, these arguments are beside the point in the circumstances of this case. For here it appears that appellants did nothing for four months while the action was pending; they did not assert that they offered evidence or information to the government at any time, although before this Court—but not in their Motion to Intervene—they now charge the government with being derelict in its investigation. Appellants should not be entitled to sit by for four months while the complaint is pending and the government is pursuing its investigation and then appear on the eve of judgment to seek intervention on the basis that they are interested in this case, would like to prevent New York from implementing reapportionment according to the 1970 census, and disagree with the Attorney General's view of the public interest.

Moreover, as we stated in our Motion to Dismiss or Affirm, at p. 4, n. 3, we were not called upon in the district court to present evidence in regard to the allegation of appellants' counsel that government attorneys told him the Attorney General would not consent to a declaratory judgment,[46] but it is our position

[46] Affidavit of Eric Schnapper (App. 48a–51a).

that the statements of appellants' counsel are not an accurate representation of the conversations between him and these government attorneys. While this Court is not the appropriate place to present evidence on this question, we will, if appropriate and relevant, present such evidence in the district court should any further hearing be deemed necessary.

In view of the other factors we have discussed above, however, we believe that the district court properly exercised its discretion in refusing to grant appellants' motion to intervene.

CONCLUSION

For the foregoing reasons, the orders of the district court denying appellants' motions to intervene and to alter judgment should be affirmed. See *Syufy Enterprises* v. *United States*, 404 U.S. 802.

Respectfully submitted.

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